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No. 83-2125

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

LINDA S. McMAHON, as Director of the Department
of Social Services of the State of California,

Petitioner,

v.

JANET VAESSEN, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

The issue raised by the petition for writ of certiorari is not whether tax refunds should be counted in calculating AFDC benefits. Refunds must be considered. The issue is whether the state court below correctly decided that in California a refund should be treated as a "resource" and calculated in one manner, instead of as "income", which would require different calculations.^{1/}

Petitioner has failed to show that this is an important federal issue which this Court needs to resolve. As will be discussed, there are no conflicts between the circuit courts of appeal on the issue, and the only state supreme court decision that conflicts

^{1/} If a refund is treated as a resource, it is counted against the limit on resources a state may set for AFDC families. 42 U.S.C. § 602(a)(7)(B). If a family's resources exceed the maximum amount permitted, the family is ineligible for assistance altogether. Id.

If a refund is treated as income, in effect the refund is subtracted from an AFDC family's monthly grant two months after it is received. Pet. 3a, 9a.



with the decision below construed regulations different from those at issue here. Neither Congress nor the Department of Health and Human Services (HHS) has ever required that income tax refunds to AFDC recipients be treated as income, even though several states have treated them as resources for years. The absence of federal legislative or executive interest in the issue belies any claim that an "important question of federal law" is involved in this case. See United States Supreme Court Rule 17(c).

As will also be shown, petitioner's argument that this case should be held pending disposition of Heckler v. Turner, No. 83-1097, cert. granted, February 27, 1984, misconstrues the relationship between Turner and this case. The argument of the AFDC recipients in Turner, that mandatory payroll deductions should not be counted as income actually available to working recipients at the time the money is withheld from their paychecks, is not



inconsistent with the decision below. However Turner is decided, money withheld from pay-checks will be counted as available to recipients when later received as income tax refunds. The only question in this case is whether the money will be counted as income or as a resource.

II. THERE ARE NO CONFLICTS IN LOWER COURT DECISIONS THAT REQUIRE THIS COURT'S RESOLUTION.

During the 45 years that Congress has required the states, in determining AFDC grants, to "take into consideration any other income and resources" (Pet. 8; 42 U.S.C. § 602(a)(7)(A)), no federal circuit court of appeals has decided the question in this case. Only two other state supreme courts have decided the issue, reaching opposite results. Anderson v. Morris, 87 Wash.2d 706, 558 P.2d 155 (1976), holding that tax refunds must be treated as a resource; Steere v. State Dept. of Public Welfare, 308 Minn. 390, 243 N.W.2d



112 (1976), ruling that refunds may be treated as income to AFDC recipients.^{2/} No court outside of California, since 1976, has held that under the federal AFDC statutes

^{2/} In addition, a handful of lower courts have discussed the appropriate treatment of tax refunds to AFDC recipients. Only two of those courts addressed whether refunds should be treated as income or resources under federal law, again with opposite results. In Hawaii, the district court held that refunds are resources. Kaisa v. Chang, 396 F.Supp. 375 (D. Hawaii 1975). In Oregon, an appellate court ruled that refunds may be treated as income. Walker v. Juras, 16 Ore. App. 295, 518 P.2d 663 (1974); but see Schroeder v. Hegstrom, No. 84-289-PA, ___ F.Supp. ___ (D. Ore. 1984) (available on Lexis), holding that Oregon may not count the same funds as available income both when earned in one year and when refunded in a later year. See also Curry v. Blum, 73 App. Div.2d 965, 424 N.Y.S.2d 450 (N.Y. 1980), treating tax refunds as income for AFDC recipients without considering whether they might be resources instead under federal law; Department of Public Welfare v. Ivy, 18 Pa. Comwlth. 348, 336 A.2d 435 (1975) (same).

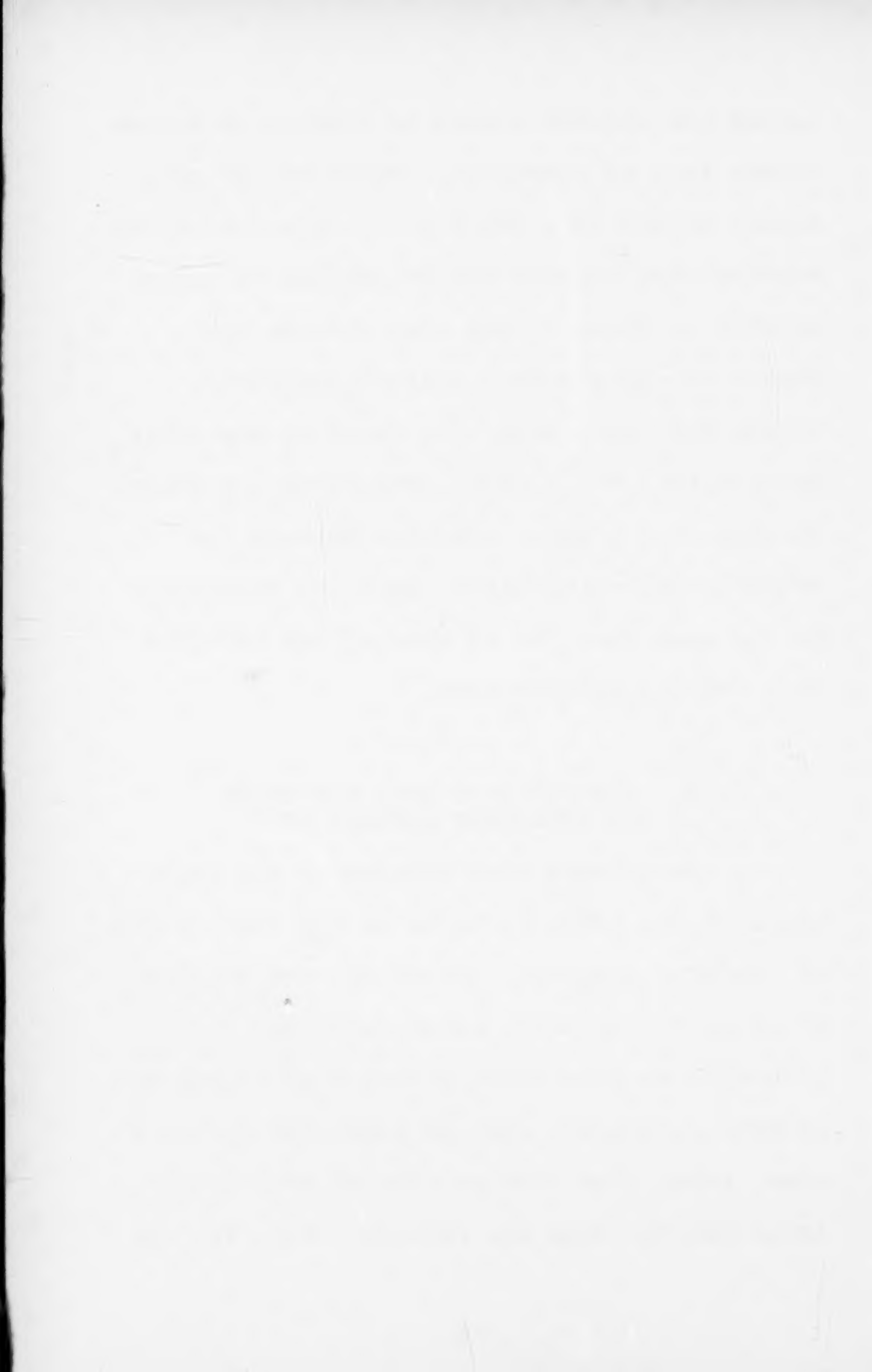
More recently, three federal district courts have stated that as long as money is treated as income when withheld as payroll deductions from an AFDC recipient's paycheck, it may not later be treated as income when received as a refund. Schroeder, supra, Opinion and Order at 8-9; Williamson v. Gibbs, 562 F.Supp. 687, 688-90 (W.D. Wash. 1983); Dickenson v. Petit, 536 F.Supp. 110, 1120, n.22 (D. Me. 1982) (dictum), aff'd, 692 F.2d 177 (1st Cir. 1984). See Section IV infra.



income tax refunds should be treated as income rather than as resources. Moreover, as petitioner points out, the earlier opinions--those holding that refunds may be treated as income as well as those ruling that refunds are resources--construed a federal regulatory scheme different from that faced by the court below. Pet. 8-9. Thus, petitioner has failed to show that a major conflict between the decision below and other appellate decisions on the same question of federal law requires this Court's intervention.

III. THE PETITION DOES NOT RAISE AN IMPORTANT FEDERAL ISSUE.

Petitioner also overstates the importance of the issue involved to the functioning of the AFDC program. Initially, the amounts of money involved are relatively low. Although, as petitioner points out, 60 percent of AFDC recipients work at some time during a year, fewer than five percent of AFDC recipients benefit from tax refunds. Pet. 4a. By



petitioner's own figures, the amount of money received in tax refunds amounts to approximately one one-thousandth of annual AFDC grants in California.^{3/}

An even stronger indication of the lack of importance of the issue in this case to the functioning of the AFDC program is the lack of Congressional or regulatory interest in the issue. Although AFDC statutes and regulations have been amended numerous times, neither Congress nor HHS has ever seen fit to define the difference between "income" and "resources" for AFDC purposes, which would resolve the issue herein. HHS has taken a laissez faire attitude towards the numerous states which, through administrative regulation

^{3/} Petitioner estimated that in 1976-77 approximately 22,700 California AFDC recipients received tax refunds averaging \$131 per recipient (Pet. 4a), for an estimated total of \$2,973,700 per year. The combined federal and state appropriation for AFDC in California (county governments also pay a share) was more than \$2.8 billion in 1983. California Budget Act of 1983, Stats. 1983, ch. 324, Items 5180-101-001, 5180-101-866.



or court decision, have decided to treat income tax refunds as resources rather than as income.^{4/} The agency has stated that certain payments, such as disability insurance payments, must be treated as income,^{5/} but has never taken such a position with regard

^{4/}See, e.g., Colorado Dept. Soc. Serv., Staff Manual Vol. 3 Income Maintenance, § 3.250.31 (refunds disregarded altogether the month received and counted as resources thereafter); Idaho Operating Policies and Procedures, Standards for Determining Need, § 3131.6-.61 (AFDC recipient has the option of treating tax refund as resource or income); State of Illinois Dept. Public Aid, Categorical Assistance Manual (AFDC), § 505.6 (refunds treated as assets (resources) rather than income); Maine Public Assistance Payments Manual, Ch. II, § C, p. 11 (refunds treated as assets); Maryland Dept. Human Resources, Income Maintenance Administration, COMAR 06.03.02.05, 4 D 56 (refunds treated as resources); Minn. Dept. Public Welfare, AFDC Program Manual, IV-M-9-i (tax refunds excluded from consideration altogether); N.Y. State Dept. of Social Services, Administrative Directive, Transmittal No. 82ADM-9, March 25, 1982 (income tax refunds must be treated as resources). In addition, as discussed previously, court orders in Hawaii, Oregon and Washington forbid counting of refunds as income. See cases cited in note 2 supra.

^{5/}See Appendix "A" (Policy Statement by Jo Anne B. Ross, Acting Associate Commissioner for Family Assistance, U.S. Department of Health and Human Services, Social Security Administration, dated September 13, 1983).



to income tax refunds. Thus, the issue in this case, while of enormous importance to the individual respondents,^{6/} has never been deemed significant by Congress or HHS, the agencies responsible for setting nationwide AFDC policy.

Petitioner argues, nonetheless, that treating refunds as resources would emasculate the "lump-sum" rule, a recently enacted amendment to the Social Security Act which specifies that when certain AFDC recipients receive "an amount of income" in a large lump sum, the income will be considered available not only in the month received but in future months as

^{6/}As recounted by the court below, when refunds were treated as income in California, an AFDC recipient who received an income tax refund and spent that refund to repay existing debts would find her grant reduced by the amount of that income two months later. In many cases, this caused extreme hardships and disruptions of family life. Pet. 3a-4a.

well. 42 U.S.C. § 602(a)(17).^{7/} Notwithstanding that the plain language of the lump sum rule applies only to "amounts of income" and does not specify when an amount must be considered income, petitioner argues:

It must be conceded that the purpose of the "lump-sum" rule is to make sure that the receipt of a "lump-sum" payment is treated as "income" in the month of receipt and budgeted for use in ensuing months. (Pet. 9-10.)

In fact, however, HHS, the agency charged with implementing the lump sum rule, recently has stated that

States have been permitted their choice of treating non-recurring or "windfall" lump sum payments as income or resources. Examples of windfall non-recurring payments are gifts, inheritances,

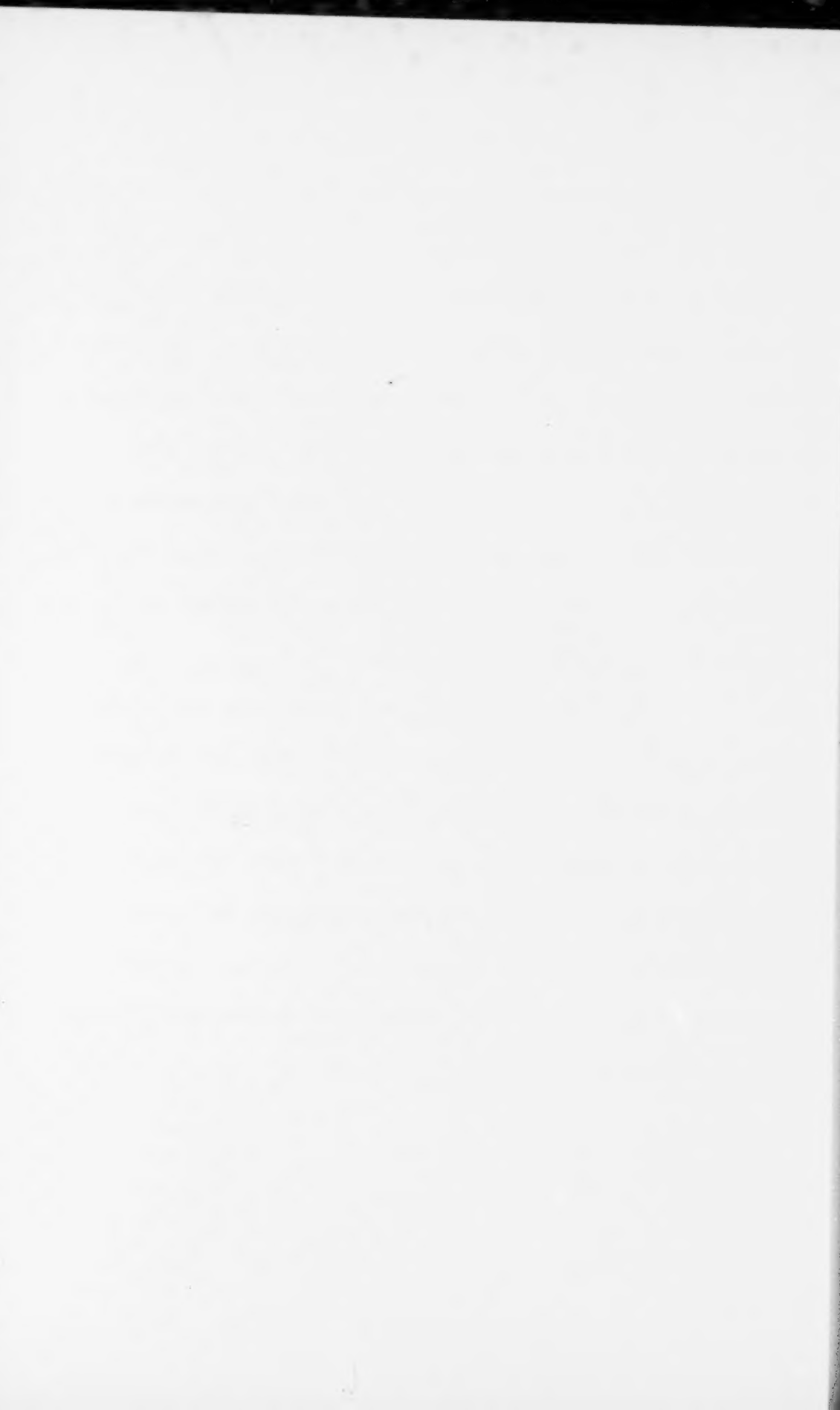
^{7/}The statute specifies that "such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month . . . divided by (ii) the standard of need applicable to such family. . . ." Id. § 602(a)(17)(A).



lottery winnings, damage claim settlements, insurance death benefits, etc. (HHS Policy Statement, supra (Appendix "A"), at 1-2.)

Indeed, some lump sums, such as court settlements used for the purpose paid (e.g., to meet the cost of a lost vehicle), may be disregarded altogether. Id. at 2. Thus, the determination by Congress of how lump sums of income should be treated has very little to do with the issue in this case, whether a refund is income or a resource.

In summary, neither Congress nor HHS has ever expressed interest in the issue presented in the petition, the issue does not involve a great deal of money, and the decision below does not threaten other aspects of the AFDC program. By any criterion, petitioner has failed to demonstrate the existence of an important federal issue.



IV. THERE IS NO VALID REASON TO HOLD
THIS CASE PENDING DISPOSITION OF
HECKLER VS. TURNER.

Petitioner argues that her petition in this case should be held pending disposition of Heckler v. Turner, supra, No. 83-1097, because a victory for the AFDC respondents in both Turner and this case would be unfair to the government. Pet. 10-13. As shown above, petitioner has failed to demonstrate an important federal question that this Court needs to resolve. In the absence of an important federal issue, this Court should not grant a petition for writ of certiorari merely to prevent indigent welfare recipients from receiving a perceived "windfall" averaging \$131 per year. (Pet. 4a.)

Moreover, petitioner misconstrues the relationship between Turner and this case. While it would be inequitable for the government to prevail in both Turner and Vaessen, it does not follow that it would be inequitable for the AFDC recipients to win both cases.



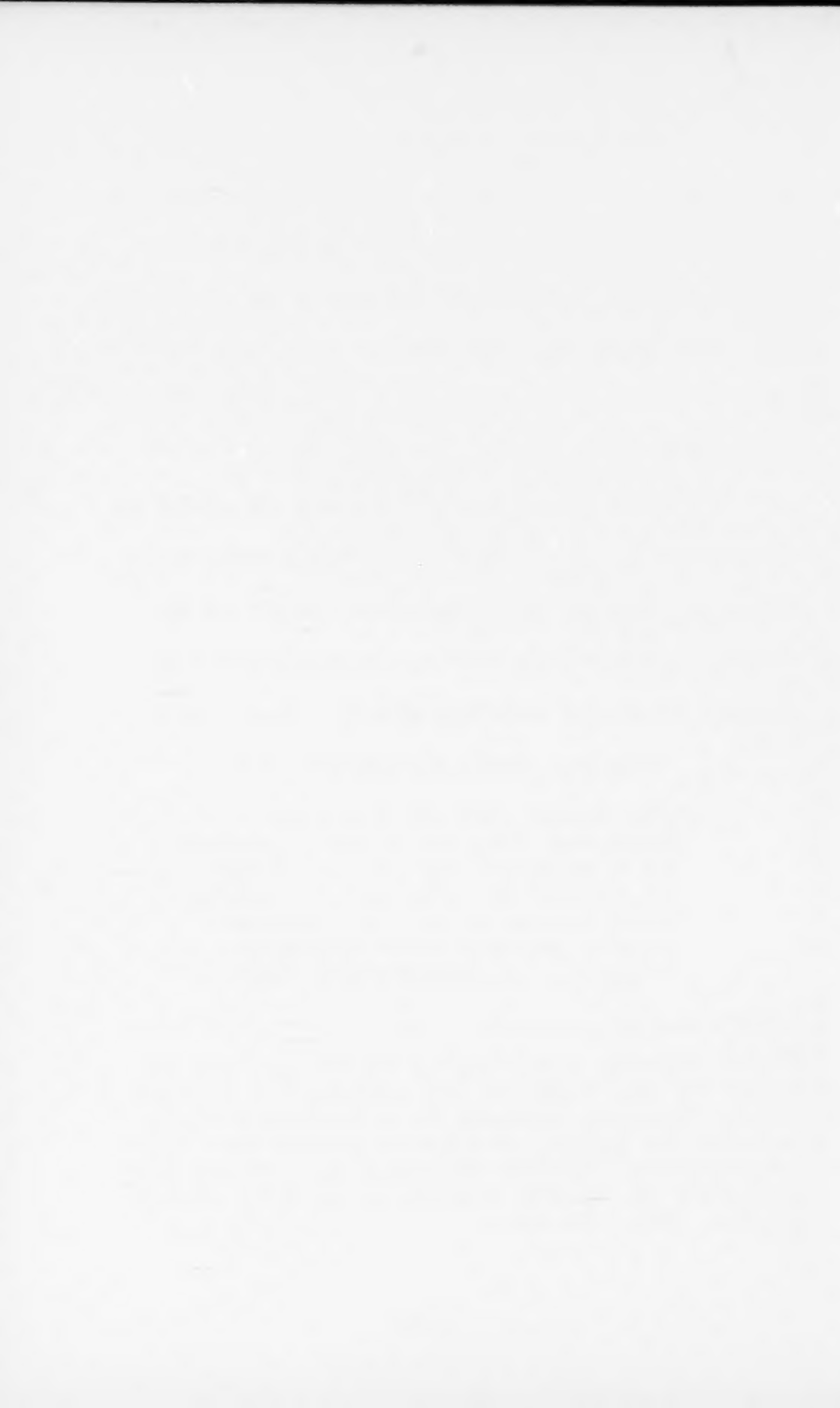
The issue in Turner is whether the state may count mandatory payroll deductions as income actually available to an AFDC recipient in the month the money is withheld, and then subtract the amount from the recipient's grant. See Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983).

Petitioner concedes that it would be inequitable to "double count" the very same money as income when received later as an income tax refund, and again subtract the amount from the monthly grant. Pet. 10-13.^{8/}

However, declares petitioner,

the State just as strongly believes that to allow a portion of a person's salary to escape treatment as "income" altogether does violence to the Congressional mandate that the State "shall, in determining need,

^{8/}The "double counting" problem was not an issue at the time of the California Supreme Court decision because of a district court opinion in Turner enjoining petitioner from considering monies withheld for income tax purposes as income available to AFDC recipients. Pet. 6a-7a.



take into consideration any other income and resources' of the family." 42 U.S.C. § 602 (a) (7). (Pet. 11.) (Emphasis added by petitioner.)

Thus, petitioner argues, if the government loses Turner it should prevail in this case.

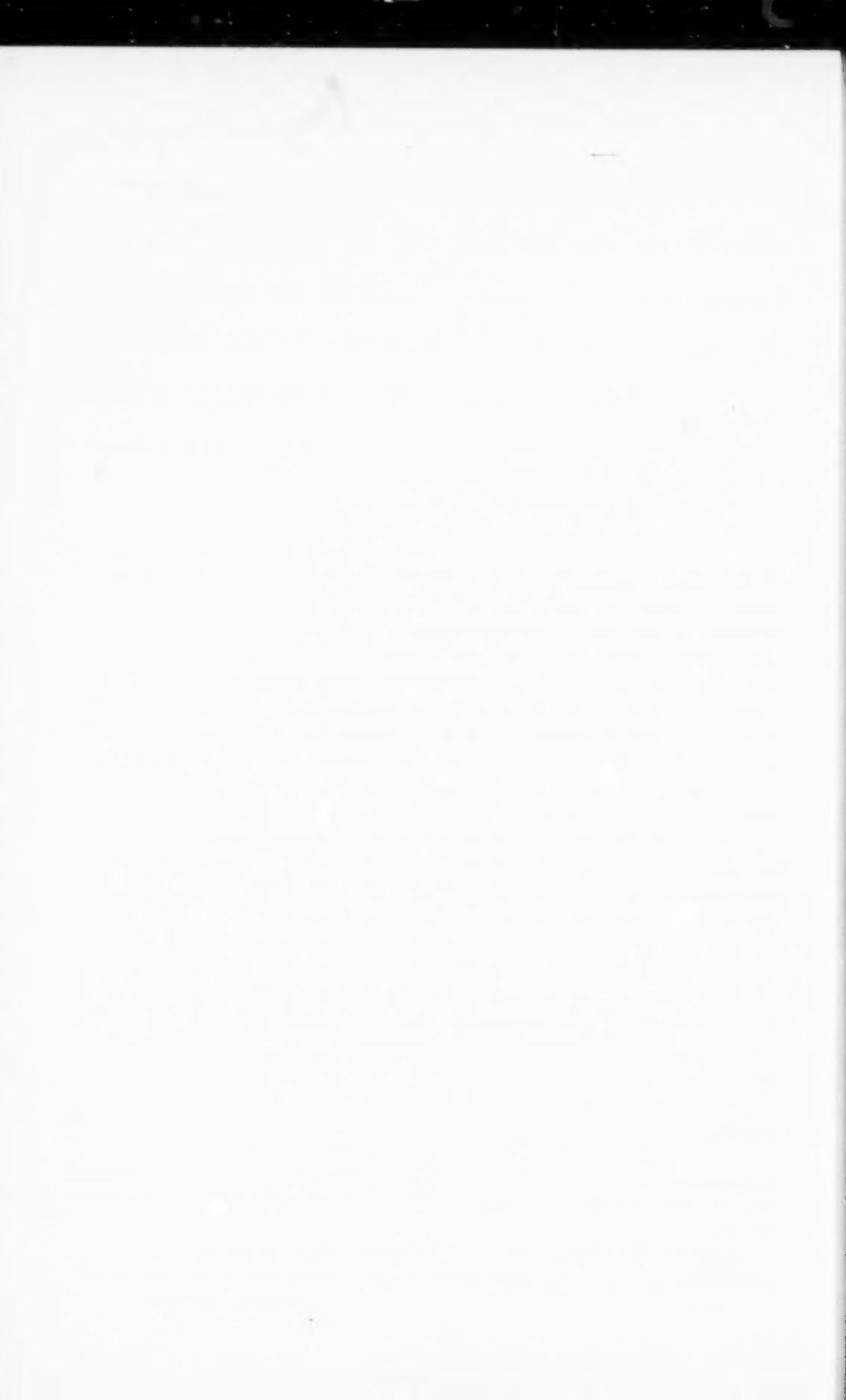
The very statutory passage quoted by petitioner refutes her contention. The state's mandate is not to consider all sums of money received by a recipient as income, but rather to "take into consideration any other income and resources of the family." If the AFDC families prevail in both Turner and Vaessen, income tax refunds will still be considered. They will be considered as resources and counted against the statutory limit California imposes on resources an AFDC family may accumulate. Cal. Welf. & Inst. Code §§ 11155, 11257. If receiving a refund causes a family's resources to exceed the maximum amount permitted, the family will become ineligible for assistance altogether. 42 U.S.C. § 602(a) (7) (B). In short, while



"double counting" of refunds is a legitimate concern if the government prevails in both Turner and this case, there is no possibility of "zero counting" of refunds if the AFDC families win both cases. The pendency of Turner does not provide a basis for granting a petition in this case.^{9/}

^{9/} If the government prevails in Turner, however, the prospect of "double counting" would constitute an independent justification for the decision below in this case, and thus another reason for denying the instant petition. Justice Rehnquist recently granted the federal government's request in Turner for a stay of the injunction in that case. Heckler v. Turner, No. A-59 (83-1097), Order, dated August 10, 1984. This means, at the very least, that until Turner is finally resolved, mandatory deductions from an AFDC recipient's paycheck will be counted as income and, in effect, subtracted from a recipient's monthly grant. Every court that has considered the issue has stated that it would be inequitable under those circumstances to count the same money again as income when received as an income tax refund. Schroeder v. Hegstrom, *supra*, Opinion and Order at 8-9; Williamson v. Gibbs, *supra*, 562 F.Supp. at 688-90; Dickenson v. Petit, *supra*, 536 F.Supp. at 1120, n.22. See also Pet. 6a (noting that the California Supreme Court had previously issued an order prohibiting "double counting" in this case).

See also Pet. 10: "While the State is emphatic in its belief that income tax refunds
(Continued)



V. CONCLUSION

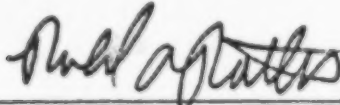
For the foregoing reasons, respondents respectfully request that the petition for writ of certiorari to the California Supreme Court be denied.

DATED: August 20, 1984.

Respectfully submitted,

RICHARD A. ROTHCHILD
MARILYN KAPLAN
STANLEY E. DOTY
ROBERT JOHN HUGHES

By



RICHARD A. ROTHCHILD
Counsel of Record

Attorneys for Respondents

Footnote Continued:

are 'income', the State is equally as emphatic in its belief that any particular dollar of 'income' should not be 'doubled counted'."

Refer to SFB-11
 FA-3-8

Office of Family Assistance
Washington, D.C. 20201

SEP 13 1983

TO: Billie A. Thompson
 Regional Administrator, OFA
 Region VI - Dallas

FROM: Jo Anne B. Ross
 Acting Associate Commissioner
 for Family Assistance

SUBJECT: Response to Regional Inquiry - Lump Sum Income
 Earmarked for a Specific Purpose (Your Memo-
 randum of July 28, 1983)

This memorandum has been prepared by the
Division of Legislative and Regulatory Policy
in the Office of Policy and Evaluation.

Issue

What latitude do States have in defining lump
sum payments as income or as resources?

Response

The general rule, as reflected in section
402(a)(7) of the Social Security Act and
Federal regulation at 45 CFR 233.20(a)(3)(ii)
(A), is that all income and resources,
whether regularly or irregularly received or
earned or unearned, of any individual apply-
ing for or receiving assistance, will be
considered in determining eligibility and the
amount of assistance except as otherwise
required or permitted to be disregarded under
the Act or other Federal law.

Under this rule, States have been permitted
their choice of treating non-recurring or
"windfall" lump sum payments as income or
resources. Examples of windfall

non-recurring payments are gifts, inheritances, lottery winnings, damage claim settlements, insurance death benefits, etc. We are carefully reviewing whether or not to continue this policy on windfall payments.

Some payments, however, while received as a lump sum, are actually an accumulation of current income received in a single sum, are not considered windfall in nature, and must be treated as income. For example, the initial OASDI payment representing an accumulation of current monthly benefits must be counted as lump sum income and cannot be considered as a resource.

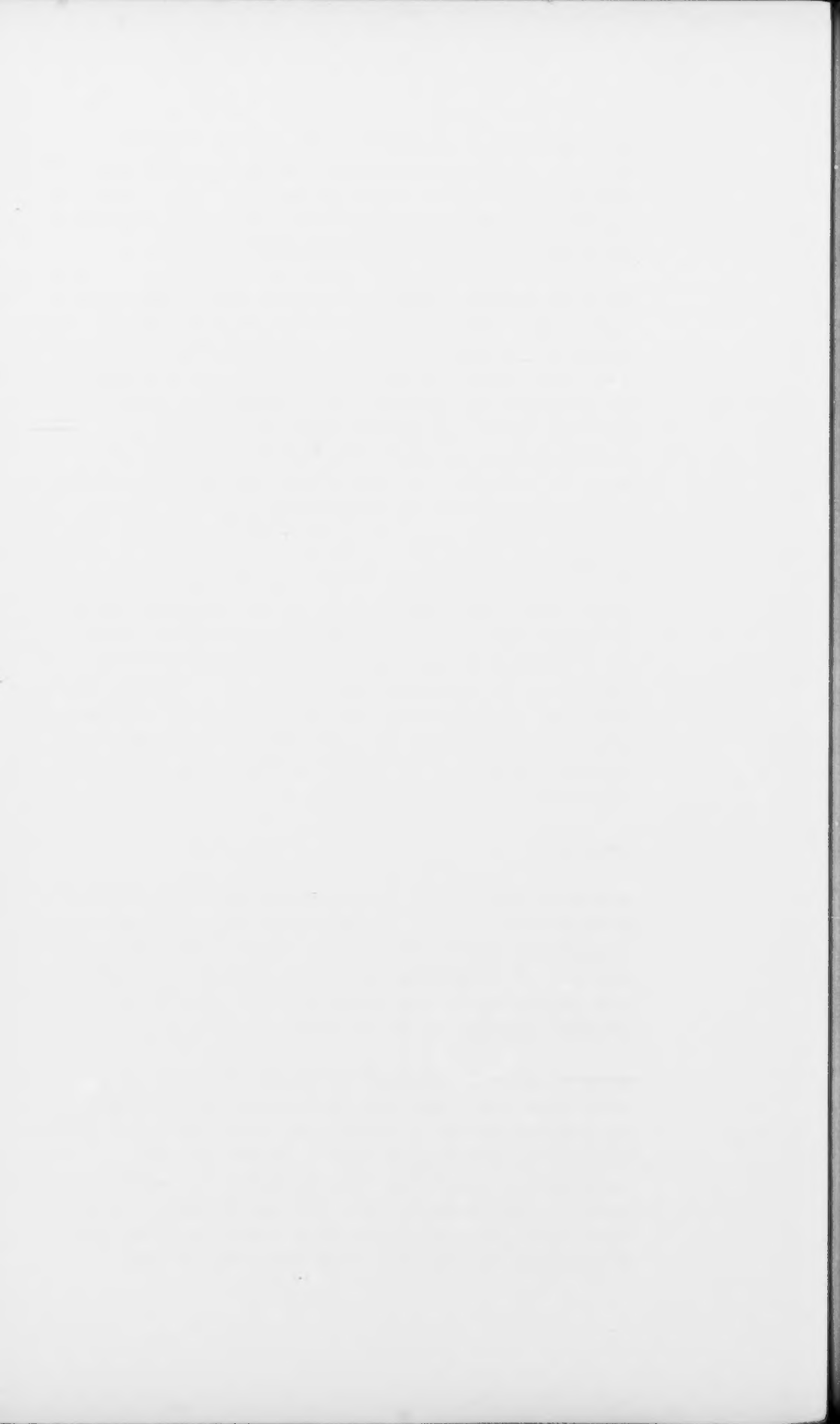
Issue

Must the lump sum provision be applied when a recipient receives compensation for loss of a resource and spends only part of the lump sum to replace the resource. Would that portion of the lump sum not spent to replace the lost resource be counted as lump sum income, thereby triggering the lump sum provision?

Response

Where a recipient is compensated for loss of a resource, i.e., an automobile, through an insurance settlement, the State has the option of treating this non-recurring lump sum payment in the nature of a windfall as either income or as a resource.

Regardless of whether a State chooses to consider the lump sum insurance settlement as income or as a resource, the State is permitted to disregard any portion of the settlement used for the purpose for which paid. For example, if the settlement is to meet the cost of loss of a vehicle, the portion used to replace the vehicle is not



required to be counted as income or as a resource in determining the amount of the AFDC payment. This is clear in the preamble to the final regulation implementing the Omnibus Budget Reconciliation Act of 1981 (OBRA) (Federal Register of February 5, 1981, pages 5656 and 5657, column 3).

Any of the money that is not spent for the purpose for which it was paid, i.e., replacement of a vehicle in your example, must then be counted as income or as a resource depending on how the State has defined insurance settlements. For example, if the State has categorized insurance settlements as income, any excess left after applying the money to vehicle replacement would trigger the lump sum rule and the provision at 45 CFR 233.20(a)(3)(ii)(D) would apply. If, on the other hand, the State has categorized insurance settlements as a resource, to the extent that the insurance money is not used to replace the vehicle, the purpose for which it was paid, it must be measured against the State's established resource limit to determine continued eligibility as provided for at 45 CFR 233.20(a)(3)(i)(B). If categorized by the State as a resource, such money does not convert to income, and trigger the lump sum rule.

If you have further questions, you may contact Joyce Fernandez on 245-3125.

cc: Regional Administrators, OFA